

MATANG INTEGRATED SDN BHD**A****v.****USAHASAMA SPNB-LTAT SDN BHD****HIGH COURT MALAYA, KUALA LUMPUR****B****LEE SWEE SENG JC****[SUIT NO: S-22-261-2010]****6 AUGUST 2010**

CIVIL PROCEDURE: *Summary judgment - Conditional leave to defend - Order for - Final amount payable by defendant to plaintiff under sub-contract agreed and undisputed - Reasons why conditional leave to defend appropriate in circumstances - Rules of High Court 1980, O. 14*

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The plaintiff was appointed as a sub-contractor by the defendant to revive and complete an uncompleted housing project ('the project'). The defendant was the main contractor for the project appointed by the Ministry of Defence Malaysia (MINDEF). Disputes arose between the plaintiff and defendant with regard *inter alia* to the accelerated completion of, and variation works done on, the project. The defendant, in due course, certified that the whole of the sub-contract works had been satisfactorily completed. At a meeting between the representatives of the plaintiff, the defendant and the Ministry of Defence, the plaintiff and defendant agreed that the final amount payable to the plaintiff under the sub-contract was RM85m. The plaintiff was, however, paid only RM5.9m of that sum. After repeated demands for the balance RM79,100,000 went unheeded, the plaintiff filed the instant action and applied for summary judgment for the amount.

D**E****F****Held (granting the defendant conditional leave to defend):**

- (1) An order for conditional leave to defend was appropriate so that MINDEF had an opportunity to clear its name in the dispute as its name had been dragged in and brought into disrepute. (para 26)
- (2) If the payments endorsed by MINDEF were still subject to approval from the Ministry of Finance, it would be good to know why the Ministry of Finance was not approving. This would be instructional to all who tendered for government projects in the future. (para 26)
- (3) The joint partners in the defendant, SPNB and LTAT were corporations established for the welfare of the needy and those who had sacrificed their lot in the defence of the nation. A conditional

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- A order ensured that no one could have access to the sum paid under the order until the court had decided on the matter after full trial. (para 27)

- B *[Defendant to pay RM79,100,000 into joint solicitors' account within 60 days of the date of order failing which plaintiff would be at liberty to enter judgment for the amount claimed.]*

Case(s) referred to:

- Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC (**refd**)
- C *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 FC (**refd**)
David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA (**refd**)
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC (**refd**)
Tan Cheng Hock v. Chan Thean Soo & Anor [1986] 1 LNS 42 HC (**refd**)

Legislation referred to:

- D Rules of the High Court 1980, O. 14
- For the plaintiff - T Kuhendren, Dato' S Satharuban & Anis Amirudin; M/s Satha & Co*
- For the defendant - Abu Bakar Jais (Hilmi Hamzah with him); M/s Hisham, Sobri & Kadir*
- E *Reported by Ashok Kumar*

JUDGMENT

- F **Lee Swee Seng JC:**

Prologue

- G [1] It is not uncommon in most construction claims that each time a contractor sues for monies due for work done as certified and for variation orders, it is almost predictable that the employer would have a counterclaim for liquidated and agreed damages claim coupled with damages for defective work and rectification work. Little wonder that few cases of this nature are fit for summary judgment. However, after hearing the parties in this case I was constrained to grant conditional
- H leave to the defendant to defend pursuant to an O. 14 application under the Rules of the High Court 1980 (RHC) taken out by the plaintiff. I now set out the reasons for so ordering.

Parties

- I [2] The plaintiff was a rescue contractor engaged by the defendant to rescue and revive an uncompleted housing project consisting of several high-rise blocks of housing accommodation for an army camp. The

defendant is a joint-venture company between SPNM and LTAT and was appointed by the Ministry of Defence of Malaysia as the Main Contractor of the project. The plaintiff was then appointed as a sub-contractor by the defendant for the completion of the project known as Package 2C ("the project"). The project was for an initial sum of RM69.1 million. The works, the plaintiff contended, were completed within what was still the extended completion period as the Superintending Officer had granted extension of time for the completion.

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Problems

[3] Disputes arose between the plaintiff and the defendant with respect to the accelerated completion and variation works done at the request of the defendant. The defendant though admitting that it had requested the plaintiff to accelerate the works nevertheless maintained that it had not agreed to the additional cost quoted. There was also a dispute as to whether the plaintiff had completed the works on time. The plaintiff on the other hand maintained that there was extension of time granted and it was through no fault attributed to it but that of the other sub-contractors of the defendant that had caused the delay.

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[4] Pursuant to a meeting at the ministry of defence headquarters on 1 September 2009 between the representatives of the plaintiff, the defendant and the Ministry of Defence, a settlement was reached between the plaintiff and the defendant wherein the final outstanding amount payable under the sub-contract would be RM85,000,000 after the plaintiff gave a discount of RM7,950 on the total amount claimed at the material time which was RM92,950.906.

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[5] Subsequently the plaintiff had only received a sum of RM5,900,000 directly from the Ministry of defence pursuant to a Deed of Assignment dated 11 September 2009 for the said sum.

[6] Indeed a Certificate of Practical Completion dated 18 September 2009 was issued by the defendant to the plaintiff certifying that the whole of the works had been satisfactorily completed.

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Prayer

[7] The refusal, failure and/or neglect of the defendant in paying the balance outstanding of RM79,000.000 despite repeated demands led to the plaintiff filing this suit in court and followed subsequently with a summary judgment application.

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A Principles

[8] It is trite law that a summary judgment application will be allowed unless the defendant can raise a triable issue that merit the plaintiff's claim going for trial. In a construction claim it is not unusual for affidavits to run into pages and exhibits to be equally voluminous. It is the duty of the judge hearing the application to sieve and separate as it were the wheat from the chaff and to look at the quality of the traverse of the defendant and whether there is a genuine set-off or counterclaim. Here only a defence has been filed without a set-off or counterclaim inspite of the so-called triable issues raised by the defendant.

[9] At this juncture it would be apropos to remind ourselves of the salutary words that fell from the lips of Lord Diplock in the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212, at p. 217:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[10] The above caution and clarification was applied in the Supreme Court case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 at p. 19, where Mohamed Azmi SCJ in delivering the majority of the court said in succinct simplicity:

Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[11] I set out the above partly in response to the defendant's counsel's assertion that as the arguments had gone on for about 2 1/2 hours from 3.30pm to 6pm, there must then be of necessity some triable issues on the face of the plaintiff's claim. If such is the test then every counsel

would just have to file in thick affidavits and exhibits with thicker still bundle and supplemental bundles of authorities and all would be well as tending to show at least a triable issue! Truly nothing turns on thickness of affidavits and exhibits nor of authorities but on the truth or otherwise of the totality of traverse in the context of undisputed contemporary documents that do not lie.

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[12] It is against this backdrop that the various triable issues raised by the defendant shall now be considered.

1st Triable Issue

[13] The defendant had never given any instructions to the plaintiff in October 2008 for the project to be expedited and completed with Certificate of Fitness (CF). The request by the defendant to the plaintiff dated 21 July 2008 for the completion of the works by end of October 2008 had emanated from a request by MINDEF dated 16 July 2008 addressed to the defendant to deliver the project with a CF by end of October 2008 (exhibit USL 5 & 4 respectively). On 22 July 2008 the plaintiff informed the defendant that the project could be completed by end of October 2008 subject to the variation of the contract sum of RM167,566.335.99. The plaintiff continued to complete the project and the SO issued an extension of time to complete the project to 18 September 2009 and the SO also issued a CF dated 18 September 2009 to the project. In the light of the above I cannot accept as credible the defendant's assertion that they had never given any instructions to the plaintiff for the project to be expedited.

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2nd Triable Issue

[14] The 2nd triable issue raised was that the defendant had never accepted the offer or quotation made by the plaintiff *vide* their letter dated 22 July 2008 (Exhibit USL 6).

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[15] Again if the defendant had not accepted the quotation for accelerated completion they could easily have written to the plaintiff to say in no uncertain terms that they are not agreeable to the revised quotation and costing and that should the plaintiff proceed they do so at their own peril. It looks like a case where the defendant wanted to have the cake and eat it as well in that they wanted to have the benefit and blessing of accelerated completion as requested by their master MINDEF but not the higher cost that comes correspondingly with it. There was clearly no objection by the defendant here and clearly they are estopped now from saying that while we have no objection to your accelerated completion as requested by us we nevertheless do not agree on your revised quotation.

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A 3rd Triable Issue

[16] The 3rd issue is that any variations or changes to the price of the contract sum based on MINDEF's request ought to involve MINDEF and the Ministry of Finance and that it did not solely depend on the defendant.

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[17] The defendant had not drawn the court's attention to any letter from them to MINDEF requesting for approval of the revised quotation but in any event there was that crucial and critical meeting on 1 September 2009 where the parties in the presence of the Minister of

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Defence and other representatives of MINDEF agreed that the final outstanding sum payable under the sub-contract would be RM85 million after the plaintiff had given a discount on the total amount claimed. The plaintiff's version of what happened at the meeting is captured in their letter to the defendant dated 1 September 2009 (exh. MISB-2)

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reproduced below:

Matang Integrated Sdn Bhd

Ref: MISB/USL/Kementah2/2009/T112

01st September 2009

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YBhg. Dr. Hj. Kamarul Rashdan Hj. Salleh
Usahasama SPNB-LTAT Sdn. Bhd.
Tingkat 10, Bangunan MAS,
Jalan Sultan Ismail,
50250 Kuala Lumpur.

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Sir,

Cadangan Pembangunan Perumahan Untuk Anggota-anggota Tentera
Dan Kakitangan Awam Di Lembah Kelang-kem Kementah 2
(Package 2C)

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We refer to our letter (reference no. MISB/USL/Kementah2/2009/T107 dated 23rd July 2009) and the meeting held this morning at the Ministry of Defence Head Quarters, attended by the Defence Minister YB. Dato' Seri Dr Ahmad Zahid Hamidi, Syarikat Perumahan Negara Berhad Managing Director, YBhg. Dr Hj Kamarul Rashdan Hj Salleh and our representatives En. Ainul Azizul Abdul Hafiz, Datuk Benny Tze Fook, Mr Allen Soh and Mr Law Boon Chong.

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As agreed in the meeting, we are writing to confirm our acceptance of Ringgit Malaysia: Eighty Five Million Only (RM85,000,000.00) nett, as final outstanding payment for the above project.

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As agreed in the meeting, a Part Payment is payable to Matang Integrated Sdn. Bhd. Latest by this week. However, the balance of payment is to be paid through a Deed of Assignment to be executed between the Minister of Defence and Matang Integrated Sdn Bhd with the consent of Usahasama SPNB-LTAT Sdn. Bhd. **A**

As requested, our Bank Account details are as follows: **B**

Bank Name : Hong Leong Bank Berhad
Branch : Sri Petaling, Kuala Lumpur
Account Name: MATANG INTEGRATED SDN BHD
Account No. : 194-01-00286-6 **C**

Your cooperation and assistance to resolve the above issue before Hari Raya Aidil Fitri is very much appreciated.

Thank you.
Matang Integrated Sdn Bhd. **D**

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Ainul Azizul Abdul Hafiz
Project Director

C.C (1) YB. Dato' Seri Ahmad Zahid Hamidi **E**
Minister Of Defence
Ministry Of Defence Malaysia
Jalan Padang Tembak
50634 Kuala Lumpur.

(2) YBhg. Dato' Abu Bakar bin Haji Abdullah **F**
Ketua Setiausaha
Jalan Padang Tembak
50634 Kuala Lumpur.

(3) YBhg Dato' Mohamad Khalid bin Hj. Shariff **G**
Timbalan Ketua Setiausaha (Pembangunan)
Jalan Padang Tembak
50634 Kuala Lumpur.

(4) Tuan Haji Nordin bin Haji Ahmad **H**
Bahagian Pembangunan
Kementerian Pertahanan Malaysia
Jalan Padang Tembak
50634 Kuala Lumpur.

(5) En. Hisham Azlin bin Zainun **I**
KPSU Unit Perumahan
Kementerian Pertahanan Malaysia
Jalan Padang Tembak
50634 Kuala Lumpur

- A** [18] The defendant had further made a clear admission of the final outstanding sum of RM85 million payable in their own letter dated 3 September 2009 (exh. MISB-3). A copy of the said letter in its original language is also reproduced below:

B USAHASAMA SPNB-LTAT SDN BHD
(540473-U)

Ruj : sila maklumkan
Ruj kami : SPNB/USL-LTAT/MISB-HTDSB/09/06
Tarikh : 3hb September 2009

C YB Dato' Seri Ahmad Zahid Hamidi
Menteri Pertahanan
Kementerian Pertahanan Malaysia
Jalan Padang Tembak
50630 Kuala Lumpur "Serahan Tangan"

D As Salamu 'Alaykum Dato' Seri,

Projek: Cadangan Pembangunan Perumahan Untuk Anggota-
Anggota Tentera Dan Kakitangan Awam Di Lembah Kelang-
Kem Kementah 2 (Package 2C)

E Kontrak: Usahasama SPNB-LTAT Sdn Bhd (USL-LTAT)
dan Matang Intergrated Sdn Bhd (MISB)
(No Kontrak: USL/KMTH-2 (2C)/02/08)

F Dengan segala hormatnya saya merujuk kepada perbincangan antara Dato' Seri dan pegawai-pegawai Kementerian Pertahanan Malaysia, Datuk Benny Tze Fook, En Ainul Azizul Abdul Hafiz, Mr Allen Soh, Mr Law Boon Chong bagi pihak MISB dan saya pada 1hb September 2009 yang bertempat di pejabat Dato' Seri.

G Adalah dengan ini dimaklumkan bahawa pada dasarnya kami bersetuju dengan cadangan YB Dato' Seri bahawa bayaran sebanyak RM85,000,000.00 akan dibayar terus oleh pihak Kementerian Pertahanan kepada MISB selaku submitted-kontraktor USL bagi Project di atas. Pihak kami mengesahkan bahawa pembayaran tersebut merupakan penyelesaian penuh oleh USL terhadap baki nilai Kontrak yang masih tertunggak.

H Dalam hal ini, pihak kami akan berhubung terus dengan MISB bagi tujuan penyediaan dokumentasi yang berkaitan dengan pelaksanaan pembayaran tersebut dan memaklumkan pihak YB Dato' Seri tentang status perkara ini dari semasa ke semasa.

I Sekian, terima kasih.

Yang Benar,
USAHASAMA SPNB-LTAT SDN BHD

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Dr Kamarul Rashdan Bin Salleh MRICS, MBTFM
Pengarah Urusan
Jurukur Bahan Bertauliah

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s.k (i) YBhg Dato' Abu Bakar bin Hj Abdullah
Ketua Setiausaha
Kementerian Pertahanan Malaysia.

(ii) YBhg Dato' Mohamad Khalid bin Hj Shariff
Timbalan Ketua Setiausaha
Kementerian Pertahanan Malaysia

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(iii) Tuan Hj Nordin bin Hj Ahmad
Bahagian Pembangunan
Kementerian Pertahanan Malaysia.

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(iv) En Hisham Azlin bin Zainun
KPSU Unit Perumahan
Kementerian Pertahanan Malaysia

(v) Matang Integrated Sdn Bhd

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[19] If further corroboration from contemporaneous documents is necessary then there is the letter from MINDEF to the defendant dated 7 September 2009 (Exhibit USL-13) that *inter alia* showed that there is no dispute on the agreement reached between the parties that the final outstanding payment payable under the sub-contract would be RM85 million and the only thing left to be resolved was on the mode of payment. A copy of the said letter from MINDEF in its original language is reproduced below:

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Kementerian Pertahanan
Malaysia
Ministry Of Defence Malaysia
Jalan Padang Tembak
50634 Kuala Lumpur

Alamat Kawat:
Telegraphic Adress:
"Kementerian Kuala Lumpur"
Telex:
"Kemtah Ma 30289"
Telefon: K.L. 20713333
Samb: 5744
No. Fax: 03-26942331

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Rujuk Tuan:
Rujuk Kami: KP/PEMB/0.9483 JIL.80 (58)
Tarikh: 7 September 2009

Dr. Hj. Kamarul Rashdan bin Hj. Salleh
Pengarah Urusan
Usahasama SPNB-LTAT Sdn. Bhd.
Tingkat 10, Bangunan MAS
Jalan Sultan Ismail
50250 Kuala Lumpur

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- A** Faks: 03-21643051
- Tuan,
- Cadangan Pembangunan Perumahan Untuk Anggota-anggota Tentera (ATM) Dan Kakitangan Awam Di Lembah Kelang Untuk Kementerian Pertahanan
- B**
- Pembayaran Kepada Kontraktor Penyelamat Bagi Tapak Kem KEMENTAH 2 (Pakej 2C)
 - Deed of Assignment Di Antara Syarikat Usahasama SPNB-LTAT Sdn. Bhd. (USL) Dan Matang Integrated Sdn. Bhd. (MISB)
- C**
- Dengan segala hormatnya saya diarahkan merujuk kepada perkara di atas dan surat tuan bil. SPNB/USL-LTAT/MISB-HTD/09/06 serta mesyuarat bersama YB Menteri Pertahanan, Timbalan Ketua Setiausaha (Pembangunan), pegawai kanan Bahagian Pembangunan dengan pihak tuan pada 1 September 2009 adalah berkaitan.
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2. Dimaklumkan bahawa di dalam mesyuarat pada 1 September dipersetujui untuk melaksanakan pembayaran secara terus (direct pay) kepada Matang Integrated Sdn. Bhd. (MISB) sebanyak RM10 juta melalui baki pembayaran kos tambahan pertama (RM196.57 juta) yang diluluskan oleh Kementerian Kewangan sebelum ini. Walau bagaimanapun, baki pembayaran kos kontrak MISB (jumlah keseluruhan sebanyak RM85 juta) hanya akan dibuat tertakluk kepada kelulusan Kementerian Kewangan terhadap permohonan kos tambahan yang dikemukakan oleh YB Menteri Pertahanan kepada YAB Perdana Menteri Merangkap Menteri Kewangan pada 3 September 2009.
- E**
- F**
3. Justeru itu, bagi membolehkan pembayaran dapat dilaksanakan, pihak tuan dikehendaki mengemukakan kepada Kementerian ini format 'Deed of Assignment' seperti di Lampiran A yang ditandatangani oleh pihak tuan dan MISB sebagai persetujuan mengenainya.
- Sekian, terima kasih.
- G**
- “Kerja Berkualiti, Belanja Berhati-hati”
“Berkhidmat Untuk Negara”
- Saya yang menurut perintah,
- H**
- tt
- (Haji Nordin bin Haji Ahmad)
Setiausaha Bahagian
b.p Ketua Setiausaha,
Kementerian Pertahanan.
- I**

Salinan kepada:

A

Y.Bhg. Dato' Ketua Setiausaha
Kementerian Pertahanan

Y.Bhg Dato' Timbalan Ketua Setiausaha (Pembangunan)
Kementerian Pertahanan

B

Setiausaha Sulit Kanan
Kepada YB Menteri Pertahanan

Other Triable Issues

[20] In the light the meeting that transpired on 1 September 2009 and the matters agreed upon as evidenced in the MINDEF's letter of 7 September 2009 and the defendant's letter of 3 September 2009, all the above three triable issues pale into insignificance. Indeed the other issues set out below have been superceded by and submerged into the agreement arrived at by the parties in the presence of the minister of defence and its representatives on 1 September 2009:

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4th issue: There had been no acceleration or fluctuation costs incurred;

5th issue: The defendant had no authority to make variations to the contract sums for sums exceeding RM100,000;

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6th issue: The plaintiff had failed to expedite the works to enable the works to be handed over to MINDEF together with CF at the end of October 2008 and that the CF was only issued on 18 September 2009 and this is irrespective of the fact that the SO had granted extension of time to the plaintiff until 18 September 2009;

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7th issue: The amount agreed is subject to the approval of the Ministry of Finance but then the defendant had not produced any letter from the Ministry of Finance specifically rejecting the claim of RM85 million as the balance sum due for the completion of the project;

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8th issue: No agreement was given by the defendant during the meeting of 1 September 2009 to pay the plaintiff the sum of RM85 million and the plaintiff was aware that even if there were such an agreement as alleged, payment if the said sum would be made by MINDEF and not the defendant;

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9th issue: The Board of Directors of the defendant has not made any resolution that the additional costs claimed by the plaintiff be approved.

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A [21] With respect to Issue 8 it must be stated that under the doctrine of privity of contract between the plaintiff and the defendant it is the plaintiff that has to look to the defendant for payment and indeed sue the defendant if there is no payment. Further there was a Deed of Assignment prepared by the plaintiff for the defendant's execution but
B for reasons not disclosed the defendant has refused to sign. This action by the defendant can be seen as a desperate attempt to convert *albeit* too late in the day the contract into one of 'pay-when-paid'.

C [22] What borders on the ridiculous and is even reprehensible is the oral submission of the defendant's counsel that if it is the MINDEF that wanted to pay the sum of RM85 million then it is all up to them! How can that be when it is taxpayers' money! Surely the defendant as the main contractor has both a duty and responsibility that only amounts certified as due should be paid over to the sub-contractor otherwise there will also be allegations of questionable payments that smack of
D corruption! The defendant cannot blow hot and cold and say if they are paying they have not agreed to pay and so no sums are owing but if it is MINDEF paying then that is no problem to them! The court can only hope that such an attitude is as rare as the Sumatran rhino in our jungle!

E [23] The 9th triable issue can only be described as the desperate attempt of the defendant clutching unto straws in its bid to create and show to the court a triable issue. Ever since when can payments be withheld merely because the members of the defendant's board have not passed a resolution. Elementary principles of company law tell us that
F these are matters within the domain of indoor management and are none of the plaintiff's concern.

G [24] On the positions of parties with respect to letters interchanged between then, we do well to remind ourselves of the dicta of Gopal Sri Ram JCA (as he then was) in *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155 at p. 159 quoted from the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v. Chan Thean Soo & Anor* [1986] 1 LNS 42:

H In *Wiedemann v. Walpole* [1891] 2 QB 534,537 an action for breach of promise of marriage, it was held, that the mere fact that defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher MR, in his judgment, remarked:

I Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise. (Emphasis added). Earlier, in his judgment, he said, *Now there are cases- business and*

mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.

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[25] Based on the principle enunciated in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, at pp. 551-552 His Lordship Steve Shim CJ (Sabah & Sarawak) speaking for the Federal Court said:

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We think it appropriate to remind ourselves once again that in every application under O. 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purposes of an application under O. 14, the preliminary requirements are:

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(i) the defendant must have entered an appearance

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(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r. 2 of the O. 14.

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... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

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Pronouncement

[26] If indeed payments agreed upon on the fateful 1 September 2009 meeting was under the colourable circumstance where the defendant though not agreeing but have no objection to the sum claimed if MINDEF is paying then I think though I am inclined to grant summary judgment, an order for conditional leave to defend would be appropriate so that at least MINDEF be given an opportunity to clear its name in this dispute where its name has been dragged in and brought into disrepute. As a corollary if the payments endorsed by MINDEF is still subject to approval from the Ministry of Finance then it would be good to know why the Ministry of Finance is not approving. This would be instructional to all who are tendering for government projects in the future.

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A [27] I am also mindful of the fact that the joint partners in SPNB and LTAT are corporations established for the welfare of those needy and also those who have sacrificed their lot in the defence of our beloved nation. A conditional order would ensure that no one can have access to the sum paid under the conditional order for leave to defend until the court decides on the matter after full trial.

B [28] I therefore made an order of conditional leave for the defendant to defend by paying the sum of RM79,100,000 into a joint solicitors' account within 60 days from the date of decision ie, on 5 July 2010 failing which the plaintiff shall be at liberty to enter judgment for the amount claimed together with interest prayed for. Cost in the cause.

C [29] The court has also fixed an early date for full hearing on 28 September 2010 and 29 September 2010 and no adjournment shall be allowed.

D **Postscript**

[30] Contractors and sub-contractors in government projects do well to caution themselves that uncertainties in revised contract sum and variation orders might well stem from the need to obtain prior approval from the ministry concerned and even the Ministry of Finance. Proceeding to complete the works without prior agreement of the relevant ministry and the Ministry of Finance might give rise to uncertainty when one sues for payments.

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